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## LEGISLATING FOR CONTROL: THE TRADE UNION ACT 2016

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### ABSTRACT

In this introduction to a special issue on the Trade Union Act 2016 (TUA), we consider the background and context in which the new legislation was adopted and then outline briefly the actual provisions which were in fact adopted after the full parliamentary process had been followed. These were by no means identical to the Government's original proposals and involved political compromise in the build up to the Brexit referendum. As the contributions to this special issue demonstrate, the motivations and justifications behind the reforms were multiple, sometimes unexpressed, and far from straightforward. Here, we review the conclusions reached by the authors, and offer some thoughts of our own regarding the new mechanisms for controlling unions in the TUA. We conclude by suggesting strategies that workers and their organisations might deploy in resisting these controls, while conceding the limitations of these responses.

### 1. INTRODUCTION

The Trade Union Act 2016 (TUA) received the Royal assent on 4 May 2016, though its provisions have yet to be brought into force. It is a ragbag of different measures, united only by a common theme of placing more controls on trade unions - restricting union-supported industrial action and picketing, increasing the Certification Officer's powers of intervention and enforcement, restricting unions' facility time and use of check-off in the public sector and placing additional

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constraints on unions' political funds. The combined effect of the measures is to make the TUA probably the most significant trade union legislation since the Employment Act 1980, representing a sudden acceleration in the incremental legislative controls subsequently introduced by Conservative governments.<sup>1</sup>

In a recent article in the *Industrial Law Journal*,<sup>2</sup> we described the consultation process leading to the publication of the Bill, and outlined those provisions of the original Bill<sup>3</sup> and the anticipated associated legislation<sup>4</sup> which were intended to introduce new laws on strikes and union-supported protests. In the course of the Parliamentary process the Government made some important concessions to the detail of the provisions, but the core provisions of the Bill are preserved in the TUA, including the provisions on industrial action which we criticised earlier.

The articles in this special edition address from different perspectives the context, justifications and ideology behind the TUA, as well as possible effects in the future. Drawing on those contributions, in this Introduction we set out the immediate background and context to the TUA, summarise the key provisions and how they changed in the course of the Bill's passage through Parliament, and discuss the justifications underpinning the TUA. We end by considering the possible responses of unions and workers to the legislation, conscious that these are uncharted waters.

## **A. Background and Context**

Most of the provisions in the Act can be traced directly to a single paragraph in the

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<sup>1</sup> For the history of the 1980s legislation, see S. Auerbach, *Legislating for Conflict* (Oxford: OUP, 1990).

<sup>2</sup> See M. Ford and T. Novitz, 'An Absence of Fairness...Restrictions on Industrial Action and Protest in the Trade Union Bill 2015' (2015) 44 *Industrial Law Journal* (ILJ) 522.

<sup>3</sup> The Bill was introduced in Parliament on 15 July 2015.

<sup>4</sup> The proposed changes to the rules preventing agency workers replacing strikers, for example, were to take place by means of amendments to the Conduct of Employment Agencies and Employment Business Regulations 2003: see *ibid.* at 538-9. But see below on the progress of this measure.

2015 Conservative Party Manifesto.<sup>5</sup> Located in a section dealing with ‘jobs for all’ and cutting red tape on businesses, a list of the envisaged changes to the law on industrial action, check-off and public sector facility time appeared under the sub-heading that ‘we will protect you from disruptive and undemocratic strike action’. The proposed measures on opt-ins to trade union political funds were dealt with later in a single sentence, under the heading ‘we will deliver better public services and more open government’.<sup>6</sup> Appealing to the effect on the wider public rather than (for example) economic benefits or democratic imperatives, both sets of proposals sat awkwardly in their respective sections, giving the impression that the author was not sure where to place them.

The Manifesto commitment was, it appears, strongly influenced by a paper produced for the think-tank Policy Exchange in 2010, entitled *Modernising Industrial Relations*,<sup>7</sup> as explained further by Alan Bogg in his article in this issue.<sup>8</sup> While the policy paper acknowledged that strikes action were ‘relatively rare’ compared to the 1970s, it noted that they were ‘overwhelmingly concentrated’ in the public sector<sup>9</sup> and went on to question whether there should be a right to strike at all under modern conditions, in which employees can either bring claims to employment tribunals to enforce their rights or leave their job if unhappy.<sup>10</sup> As Bogg notes, the correspondence between the proposals in *Modernising Industrial Relations* and the Government’s legislative programme is very striking indeed.<sup>11</sup>

Yet while the influence of *Modernising Industrial Relations* in shaping the

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<sup>5</sup> See the Conservative Party, ‘Strong Leadership, a Clear Economic Plan, a Brighter, More Secure Future’, at <https://www.conservatives.com/manifesto> (accessed 15 June 2016).

<sup>6</sup> Ibid. 49.

<sup>7</sup> See E. Holmes, A. Lilico and T. Flanagan, *Modernising Industrial Relations* (Policy Exchange: 2010), available at <http://www.policyexchange.org.uk/images/publications/modernising%20industrial%20relations%20-%20sep%2010.pdf> (accessed 16 June 2016).

<sup>8</sup> A. Bogg, ‘Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State’ (2016) *ILJ*, this volume at x.

<sup>9</sup> *Modernising Industrial Relations* n.7, at 12-13.

<sup>10</sup> Ibid., at 18.

<sup>11</sup> Ibid., at 5-7.

legislation is clear, at no stage in the consultation or the Parliamentary debates did the Government or its representatives make any reference to it or draw on the free-market economic theory which drove its recommendations.<sup>12</sup> The actual justifications were absent, different or thin, as noted in section 2 below. This absence is all the more surprising because Policy Exchange's alumni include Nick Boles MP, a founding member and a director between 2002-7,<sup>13</sup> who later in his capacity as Minister for Skills signed off the responses to consultations<sup>14</sup> and represented the Government on the debates in the Bill. The result prompts a larger question about the democratic process: how can there be effective consultation or debate about legislative measures the rationale for which is not revealed or presented for scrutiny?

As well as driving the TUA, it seems that *Modernising Industrial Relations* also had an earlier influence on transforming the Certification Officer (CO) from adjudicator to investigator/prosecutor, a process continued by the TUA. The paper proposed that there should be an annual audit of trade union membership, as a means of ensuring that 'only eligible workers are balloted on [industrial] action'.<sup>15</sup> This proposal was presumably one of the factors leading to the introduction of 'membership audit certificates' and the duty on a union with at least 10,000 members to appoint an assurer in ss 24ZA-24C of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), following amendments made by the Transparency of Lobbying, Non-Party Campaigning and Trade Union

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<sup>12</sup> The Policy Exchange paper was mentioned to our knowledge only briefly in the written evidence from Tom Flanagan to the Public Bills Committee: see Public Bill Committee, 'Trade Union Bill: Written Evidence' (House of Commons: 2105), available at <http://services.parliament.uk/bills/2015-16/tradeunion/committees/houseofcommonspublicbillcommitteethetradeunionbill201516.html> (accessed 16 June 2016). There was, according to this evidence, a later consultation paper entitled 'Oiling the Wheels of Work' based on *Modernising Industrial Relations* which in turn led to the proposals in the Manifesto; but we have not been able to locate this document.

<sup>13</sup> See <http://www.policyexchange.org.uk/people/alumni/category/alumni> (accessed 15 June 2016).

<sup>14</sup> See BIS, *Government Response to the Consultation on Ballot Thresholds in Important Public Services* (January 2016) BIS/15/16 at 3, and BIS, *Government Response to Tackling Intimidation of Non-Striking Workers* (November 2015) BIS/15/621 at 4.

<sup>15</sup> *Modernising Industrial Relations*, n.7 at 6.

Administration Act 2014 (TLA).<sup>16</sup> Once more the ostensible justifications for these amendments were based on vague notions of the public interest, and not the specific reasons for controlling industrial action advanced by the Policy Exchange paper.<sup>17</sup> As well as conferring a power on the CO to investigate unions' registers of members,<sup>18</sup> the new sections in TULRCA also gave the holder of that office a wholly novel power to take enforcement action against a union in the absence of any complaint by a member.<sup>19</sup> This model of enforcement was then adopted and expanded in the TUA's measures on the CO, as Richard Arthur and Stephen Cavalier explain in their article.<sup>20</sup>

If *Modernising Industrial Relations* provided the template for much of the TUA and associated initiatives, three other background elements were probably directly relevant to the decision to legislate. The first was the growing use of 'leverage' action by unions - forms of protest not involving traditional strikes - which led to the Government commissioning the review of Bruce Carr QC.<sup>21</sup> The consultation before the Trade Union Bill on picketing and protest drew explicitly if selectively on this review, as we noted in our earlier article.<sup>22</sup> For the present, the Government has dropped its plans to change the general laws on protest, but the TUA introduces the new figure of the 'picket supervisor' and an up-date to the existing Code of Practice

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<sup>16</sup> That is, by ss 40-43 of the TLA 2014.

<sup>17</sup> See the consultation paper produced by the Department of Business, Innovation and Skills (BIS), *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Bill: Certificate of Trade Union Membership Details: Discussion Paper* (July 2013) BIS/13/1051 at 4, stating simply that: 'Trade union activity has the potential to affect the daily lives of members and non-members. The general public should be confident that voting papers and other communications are reaching union members so that they have the opportunity to participate, even if they choose not to exercise it.'

<sup>18</sup> A similar power had already been enacted by the Trade Union Reform and Employment Rights Act 1993, which led to ss 37A-E of TULRCA.

<sup>19</sup> See ss 24B-C of TULRCA, introduced by ss 43 of the TLA 2014.

<sup>20</sup> S. Cavalier and R. Arthur, 'A Discussion of the Certification Officer Reforms', (2016) *ILJ* this volume at x.

<sup>21</sup> *The Carr Report: The Report of the Independent Review of the Law Governing Industrial Relations* (15 October 2014). Available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/363806/Carr\\_Review\\_Report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/363806/Carr_Review_Report.pdf) (accessed 1 July 2016).

<sup>22</sup> See Ford and Novitz n.2 at 526-7.

on Picketing (1992) to ‘clarify the range of legal protections which already exist’ is awaited.<sup>23</sup>

A second background factor was the judgment of the Court of Appeal in *RMT v Serco*,<sup>24</sup> in which Elias LJ stated that the legislation on ballots in TULRCA should be construed in the normal way, not strictly against unions, and unions were entitled to rely on the information in their own membership records when it came to showing compliance with the statutory rules.<sup>25</sup> While the judgment only indicated a change in emphasis rather than substance, in practice it enhanced the ability of unions to resist injunction applications, exemplified by the later ruling of Eady J in *Balfour Beatty v Unite*.<sup>26</sup> It is no coincidence, we consider, that these rulings were swiftly followed by proposals for compulsory membership audits and new powers on the part of the CO to investigate membership records and take unilateral enforcement action.<sup>27</sup> To ensure a union could not simply sit back and rely on its own methods of record keeping, a third party assurer, backed by an interventionist regulator, would assess if the existing internal system was ‘satisfactory’.<sup>28</sup> The TUA builds on this model, as well as going much further to close the chink of light which *Serco* revealed in the statutory regime.

The third relevant factor was the judgment of the European Court of Human Rights (ECtHR) in *RMT v United Kingdom*<sup>29</sup>, delivered in April 2014, holding that the UK’s prohibition of secondary action was not in breach of Article 11. Before that judgment, the Grand Chamber in *Demir v Baykara*<sup>30</sup> signalled it would take account

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<sup>23</sup> See *Government Response to Tackling Intimidation of Non-Striking Workers*, n.14 above, at 8

<sup>24</sup> [2011] ICR 848.

<sup>25</sup> *Ibid.* at [ 9], [69]-[72]. Cf. the proactive duty Blake J read into the sections in *EDF Energy Powerlink v RMT* [2010] IRLR 114, discussed and supplanted by the reasoning in *RMT v Serco* n.24 at paras [68] - [72].

<sup>26</sup> [2012] ICR 822.

<sup>27</sup> See the BIS Consultation at n.17 [15] above, which led to the provisions in TLA inserting ss.24ZA-24C into TULRCA.

<sup>28</sup> TULRCA s.24ZD(3).

<sup>29</sup> Application No. 31405/10 [2014] IRLR 467.

<sup>30</sup> Application No 34503/97, [2009] IRLR 766 at para 85. See too the articles cited in fn 75 of Ford and Novitz n.2.

of international conventions, such as International Labour Organisation (ILO) Conventions and the European Social Charter (ESC), in interpreting Article 11 of the European Convention on Human Rights (ECHR), strongly suggesting that the UK's existing strike laws were vulnerable to defeat in Strasbourg. Skating over difficult issues regarding the correct interpretation and effect of the *RMT* decision,<sup>31</sup> the Government was only too happy to take the ruling as the Court's blessing of a wide margin of appreciation in this area and thus a green light for further restrictive legislation on industrial action. As Ewing and Hendy note in their contribution to this issue, the *RMT* ruling was placed at the forefront of Government claims that the restrictions in the Bill were proportionate and hence justifiable for the purpose of Article 11.<sup>32</sup>

## **B. The Parliamentary Process**

The Trade Union Bill was discussed in Committee between 13 and 27 October 2015. Apart from some technical amendments, the only significant change was the introduction of a new clause prohibiting public sector employers from deducting union subscriptions from wages via check off.<sup>33</sup> At Report stage in the House of Commons amendments were introduced which would have permitted trade unions to use electronic balloting and workplace ballots for all forms of ballots, and to prevent or limit the Bill's application to the public sector in the devolved administrations.<sup>34</sup> All these amendments were rejected, as was a Labour attempt to

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<sup>31</sup> See A. Bogg and K.D. Ewing 'The Implications of the *RMT* Case' (2014) 43 *ILJ* 221 and M. Ford and T. Novitz n.2 at 534-5.

<sup>32</sup> See K.D. Ewing and J. Hendy, 'The Trade Union Act 2016 and the Failure of Human Rights' (2016) *ILJ*, this volume at x.

<sup>33</sup> This was then clause 14 and later, after amendments, became s.15 of the TUA 2016. See the tracked changes version of the Bill as amended in Public Bill Committee at <http://www.parliament.uk/documents/commons-public-bill-office/2015-16/compared-bills/Trade-Union-bill-151028.pdf> (accessed 1 July 2016).

<sup>34</sup> For the history to the amendments and the debates, see the House of Lords, *Library Note: Trade Union Bill* (20 November 2015), available at



remove the new rules on picketing.<sup>35</sup> In relation to electronic balloting the Minister for Skills, Nick Boles, stated that the Government was not opposed to it ‘in principle’ but that there were ‘practical objections’ based on security.<sup>36</sup>

Some further significant amendments to the provisions on industrial action, political fund contributions, facility time, check-off and the powers of the CO were introduced in the House of Lords.<sup>37</sup> With the ‘Brexit’ referendum looming and the Government anxious to obtain cross-party support for the ‘remain’ vote, the Government became less intransigent. Many of the amendments adopted in the Lords were eventually agreed to in the House of Commons debate on 27 April, albeit with noteworthy changes to the detail of the amendments on an independent review of electronic balloting, political fund opt-ins, and facility time.<sup>38</sup>

In the meantime, we have had some clarification of the Government’s claims that the legislation is compatible with human rights law and the international conventions to which the UK is a signatory. The 11-page July 2015 *Human Rights Memorandum*<sup>39</sup> from BIS was replaced by a 12-page *Memorandum* published by BIS in December<sup>40</sup> and on 5 January 2016 Savid Javid, the Secretary of State for Business, Innovation and Skills, wrote to the Joint Committee on Human Rights responding to their concerns about the Bill, including about the Bill’s compatibility with ILO Conventions signed by the UK. The limitations of these explanations and their

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<http://researchbriefings.files.parliament.uk/documents/LLN-2015-0044/LLN-2015-0044.pdf> (accessed 17 June 2016).

<sup>35</sup> Ibid. at 8-9.

<sup>36</sup> House of Commons (HC) Hansard, 10 November 2015, cols 298-9.

<sup>37</sup> The Lords’ amendments are at <http://www.publications.parliament.uk/pa/bills/cbill/2015-2016/0165/16165.1-7.html>. For the background, see the useful House of Commons briefing paper by D. Pyper, *Trade Union Bill: Lords Amendments* (26 April 2016), available at <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7537>.

<sup>38</sup> See the HC amendments at <http://www.publications.parliament.uk/pa/bills/lbill/2015-2016/0119/16119.pdf>.

<sup>39</sup> BIS/15/466 (2015), Available at: <https://www.gov.uk/government/publications/trade-union-bill-european-convention-on-human-rights-echr> (accessed 29 June 2016).

<sup>40</sup> See BIS, *Trade Union Bill: European Convention on Human Rights Memorandum* (December 2015) BIS/15/667, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/483385/BIS-15-667-european-convention-on-human-rights-memorandum\\_intro\\_lords.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/483385/BIS-15-667-european-convention-on-human-rights-memorandum_intro_lords.pdf) (accessed 26 June 2016).

scrutiny is exposed by Ewing and Hendy in this issue.<sup>41</sup>

### C. The Provisions of the TUA as Enacted

The TUA represented a dilution of so many of the original measures proposed in the Bill, that one could easily gain the impression that the Government was not wholeheartedly committed to its initial objectives (whatever these might have been). The most obvious human rights violations (even allowing for a wide margin of appreciation) or most blatant assaults on parliamentary democracy (as in the case of political funding by trade unions) were eventually either omitted or attenuated in order to mitigate their apparent effect. A full assessment of the legislative programme is hampered because its implementation relies significantly on secondary legislation (for example, the regulations defining 'important public services' which as yet have only appeared in draft form<sup>42</sup>), the exercise of ministerial discretions (as in the case of restrictions on facility time), or revisions of statutory codes of practice.<sup>43</sup> But it would be unwise to expect significant further dilution in favour of unions, because the detail is likely to be shaped by a future Conservative administration dominated by the Right of the party following the resignation of David Cameron. The Act is accompanied by Explanatory Notes, which should be an aid to interpretation,<sup>44</sup> but which rarely do more than repeat what is in the Act.

#### *(i) Strike Ballot Thresholds*

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<sup>41</sup> See letter of 5 January 2016, available at [https://www.parliament.uk/documents/joint-committees/human-rights/Letter\\_from\\_Sajid\\_Javid\\_050116.pdf](https://www.parliament.uk/documents/joint-committees/human-rights/Letter_from_Sajid_Javid_050116.pdf) (accessed 16 June 2016).

<sup>42</sup> The draft regulations are at [322] - [323] of BIS, *Government Response to Consultation on Ballot Thresholds in Important Public Services* (January 2016) BIS/15/16, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/493880/bis-16-15-consultation-on-ballot-thresholds-in-important-public-services-government-response.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/493880/bis-16-15-consultation-on-ballot-thresholds-in-important-public-services-government-response.pdf) (accessed 17 June 2016).

<sup>43</sup> Namely the Code of Practice on Picketing - see n.23 above - and in future the Code of Practice: Industrial Action Ballots and Notice to Employers (2005).

<sup>44</sup> *R (Westminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956 per Lord Steyn at paras 2-6.

Due to section 2 of the TUA, amending section 226 of TULRCA, for industrial action to have the ‘support of a ballot’ and so to benefit from the protective shield of the ‘golden formula’,<sup>45</sup> in future it will be a requirement that at least 50 per cent of those entitled to vote in fact vote (in addition to the existing requirement that a majority vote in favour of the action).<sup>46</sup> This one provision was not amended in the course of the passage of the Bill through Parliament and seems to lie at the very core of the Government’s objectives.

The second core new requirement, that 40 per cent of the eligible membership vote in favour of the strike where a majority of the membership are ‘at the relevant time normally engaged in the provision of important public services’ (IPS), was changed from its form in the original Bill as a result of an amendments introduced by the Government in the House of Lords.<sup>47</sup> First, the section no longer applies to those engaged in activities which are ‘ancillary’ to IPS, a provision in the original Bill of potentially great conceptual elasticity. Second, in a nod to the practical difficulties faced by unions, the enhanced threshold in s.3 TUA is not triggered where the union ‘reasonably believes’ a majority of the eligible constituency are not normally engaged in IPS, a qualification which is meant to protect a union from legal challenge ‘even if the belief later proves erroneous’.<sup>48</sup>

The meaning of IPS is to be clarified in future regulations.<sup>49</sup> Since we wrote our earlier article, the Government has published draft regulations.<sup>50</sup> The six categories of IPS correspond with the list in new s.226(2E) of TULRCA, of health services, education of the under 17s, fire services, transport, nuclear decommissioning and border security. While the draft Regulations give some

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<sup>45</sup> See TULRCA, ss 219, 226.

<sup>46</sup> See TULRCA, s.226(2)(a)(iii).

<sup>47</sup> House of Lords (HL) Hansard, 16 March 2016, col 1853.

<sup>48</sup> Ibid., per Baroness Neville-Rolfe.

<sup>49</sup> TUA, s.3(2D). This is subject to them falling within the categories in subsection (2E).

<sup>50</sup> See n.42 above.

clarification of which workers are caught, a penumbra of uncertainty surrounds each of the categories. For example, regulation 2 of the draft Regulations defines ‘publicly-funded emergency, urgent or critical healthcare services’ as IPS, but deemed to include ‘services which are provided in high-dependency units and intensive care’.<sup>51</sup> A moment’s thought shows the difficulty of deciding factually the precise workers who are ‘normally engaged’ in such ‘services’. The practical difficulties of applying the new provisions are analysed by Ruth Dukes and Nicola Kountouris in their article,<sup>52</sup> while the clear violation of ILO standards in this regard is highlighted by Ewing and Hendy.<sup>53</sup>

*(ii) An independent review of electronic balloting*

Perhaps the most significant concession of the Government on the industrial action provisions in the course of the Parliamentary process was the introduction of a new s.4 in the TUA, by which the Secretary of State ‘shall commission an independent review...on the delivery of secure methods of electronic balloting’ for the purpose of industrial action ballots, to be commissioned within six months of the passing of the TUA.

An amendment to similar effect was introduced by Lord Kerskale in the House of Lords.<sup>54</sup> In the debates Lord Pannick, unable to resist revealing he was the anonymous counsel who drafted the UK Government’s submissions in *RMT v UK*, said that the Bill would be ‘particularly vulnerable to legal challenge if the Government refuse to allow for electronic balloting’.<sup>55</sup> The Government eventually relented from its earlier position,<sup>56</sup> and agreed to a watered down amendment by

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<sup>51</sup> See draft regulation 2(2)(d).

<sup>52</sup> R. Dukes and N. Kountouris, ‘Pre-Strike Ballots, Picketing and Protest: Banning Industrial Action by the Back Door?’ (2016) *ILJ*, this volume at x

<sup>53</sup> Ewing and Hendy n.32 at x.

<sup>54</sup> See HL, Hansard, 8 February 2016, col. 2001.

<sup>55</sup> Ibid., col. 2007.

<sup>56</sup> See HC Hansard, 10 November 2015, cols 298-9.

which the Secretary of State owes a duty to publish a 'response' to the independent review rather than a duty to publish a 'strategy' to roll out secure electronic balloting.<sup>57</sup> As Dukes and Kountouris observe, it remains to be seen how the review is received or whether, if electronic balloting is implemented, it will in fact ensure higher turnouts.<sup>58</sup>

*(iii) Information Requirements on Industrial Action Ballots*

The TUA adds to the already long list of matters which must be included in a voting paper, so that in future it will need to set out details of the matters in dispute, the different types of envisaged industrial action short of a strike, and the period or periods within which each type of industrial action will occur, with the risk of ballot papers spreading onto two or more pages.<sup>59</sup> After objections that the requirement of giving a 'reasonably detailed indication' of the matters in issue in the trade dispute, set out in clause 4 of the Bill, could lead to unions including the 'kitchen sink' in ballot papers,<sup>60</sup> this provision was replaced with a duty to set out 'a summary of the matter or matters in issue'.

The TUA enacts without amendment the provisions in the Bill by which the union must inform members - and hence the employer - as soon as reasonably practicable after the ballot of the number of individuals entitled to vote, and whether or not the 40% and 50% thresholds were met,<sup>61</sup> assisting the employer in gathering information for an injunction application. So too in future the union must provide detailed information to the CO about industrial action in its annual return, probably intended to give him more information for the purpose of his investigatory

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<sup>57</sup> See the HC Amendments of 27 April 2016 at <http://www.publications.parliament.uk/pa/bills/lbill/2015-2016/0119/16119.pdf>.

<sup>58</sup> Dukes and Kountouris n.52 at x.

<sup>59</sup> See TUA, s.5, adding to the existing list of information to be included by s.229 of TULRCA, and pars 25-26 of the Explanatory Notes.

<sup>60</sup> See e.g. Lord Oates in HL, Hansard, 10 February 2016, col. 2248.

<sup>61</sup> See s.6, amending s.231 and the corresponding duty in s.231A.

functions.<sup>62</sup>

*(iii) Timing and duration of industrial action*

The TUA makes two changes to the Bill's clauses on notice of industrial action and the period of the ballot mandate, currently set out in s.234A and s.234 of TULRCA respectively. First, the period of notice to an employer of industrial action is no longer to be an inflexible 14 days before the action begins (in place of the existing seven days) but can be seven days 'if the union and employer so agree'.<sup>63</sup> The aim of this was, according to the Government, to reduce the pressure on unions to serve a notice of industrial action to preserve its position in the context of negotiations.<sup>64</sup> Second, the four-month ballot mandate period in clause 8 of the Bill has now been replaced by an increased period of six months, or up to nine months if the employer and union agree.<sup>65</sup> The aim of this extended period, once again, was said to be to allow time for negotiations.<sup>66</sup>

*(iv) Picket Supervisor and Regulation of Protest*

The TUA retains the Bill's new figure of the 'picket supervisor', whose presence is required at every picket line for it to be lawful<sup>67</sup> and which we discussed in detail in our earlier article,<sup>68</sup> subject to two small pieces of legislative tinkering. One is that the picket supervisor no longer needs to show the letter of approval from the union to the police or 'any other person who reasonably asks to see it';<sup>69</sup> it need only be

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<sup>62</sup> TUA s.7, inserting a new s.32ZA in TULRCA.

<sup>63</sup> TUA s.8, amending s.234A.

<sup>64</sup> HL, Hansard, 16 March 2016, col.1869.

<sup>65</sup> TUA s.9, amending s.234 TULRCA.

<sup>66</sup> HL Hansard, 16 March 2016, col.1870.

<sup>67</sup> TUA s.10, amending s.219 and inserting a new s.220A in TULRCA.

<sup>68</sup> See Ford and Novitz n.2 at 540-545.

<sup>69</sup> See clause 9 of the original Bill.

shown to the employer or someone acting on its behalf<sup>70</sup> (though reasonable steps must still be taken to supply his or her name and contact details to the police).<sup>71</sup> The second change is that the supervisor now need only wear something which 'readily identifies' his or her rôle.<sup>72</sup> These minor changes do little to address the concerns raised in consultation about the sensitive nature of trade union membership as recognised in e.g. the Data Protection Act 1998 and as shown by the recent blacklisting litigation.<sup>73</sup>

As we have explained, the Government decided finally not to supplement the already vast array of criminal and civil laws which govern protest in the UK.<sup>74</sup> Instead, there is a commitment to update the Code of Practice on Picketing 'to clarify the range of legal protections which already exist' and to provide 'clear guidance on the responsible use of social media during industrial disputes'.<sup>75</sup> As yet, however, no redrafted Code has been produced.

#### *(v) Agency Workers Replacing Strikers*

Accompanying the original Bill was a proposal to revoke regulation 7 of the Conduct of Employment Agencies and Employment Business Regulations 2003<sup>76</sup> so that it would no longer be a criminal offence to provide agency workers to perform the duties performed by striking workers.<sup>77</sup> Since our earlier article the proposal has been criticised, among others, by the ILO Committee of Experts on the Application

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<sup>70</sup> TUA s.220A(6).

<sup>71</sup> New s.220A(4) TULRCA, reproducing the original Bill.

<sup>72</sup> New TULRCA s.220A(8). This was introduced as a result of the *Government Response to Consultation on Tackling Intimidation of Non-Striking Workers* n.13 [33] – [39].

<sup>73</sup> Cf. *ibid.* and the pious sentiments at [37] – [39].

<sup>74</sup> See Ford and Novitz n.2 at 546.

<sup>75</sup> See *Government Response to Consultation on Tackling Intimidation of Non-Striking Workers* n. 13 at [24], [25] and [32].

<sup>76</sup> SI 2003/3319.

<sup>77</sup> Ford and Novitz, n.2 at 538-9.

of Conventions and Recommendations following a complaint from the TUC,<sup>78</sup> (as discussed in this issue by Ewing and Hendy) and it is not clear, for present, what has happened to this measure: it would seem to have been put on hold until the European Union (EU) referendum is completed.<sup>79</sup>

*(vi) Changes to the rôle of the Certification Officer*

Under TULRCA in its current form the Certification Officer (CO) only has power unilaterally to investigate a unions' financial affairs<sup>80</sup> and, since 1 June 2016 as a result of changes introduced by the TLA, the register of members.<sup>81</sup> The new Schedule A3 to TULRCA<sup>82</sup> gives the CO extensive new powers of investigation and enforcement with considerable significance for controlling trade unions' industrial action and wider activities. Accordingly, Richard Arthur and Stephen Cavalier see this as 'the transformation of the CO into grand inquisitor and enforcer in chief to investigate a wide range of 'relevant obligations',<sup>83</sup> while Bogg highlights the authoritarian aspects of these reforms,<sup>84</sup> and Ewing and Hendy point out the fundamental abuse of Article 6 of the ECHR that they entail.<sup>85</sup>

*(vii) Political Funds*

At present under s.84 of TULRCA a trade union member has the right to opt out of contributing to the union's political fund. Clause 10 of the Bill envisaged replacing

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<sup>78</sup> See *Application of International Labour Standards 2016(1), Report III (Part 1A)* at 154 (available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_448720.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_448720.pdf). (accessed 1 July 2016).

<sup>79</sup> The 2003 Regulations were amended in April 2016 by SI 2016/510 but not so as to revoke reg. 7.

<sup>80</sup> TULRCA ss. 37A-E.

<sup>81</sup> TULRCA s.24ZH-K. For the date in force, see SI 2015/717.

<sup>82</sup> Introduced by s.17 TUA.

<sup>83</sup> Cavalier and Arthur n.20 at x.

<sup>84</sup> Bogg n.8 at x.

<sup>85</sup> Ewing and Hendy n.32 at x.



this with a positive 'opt in' for both existing and new members. The clause was the subject of strong criticisms in the House of Lords, which appointed a Select Committee to report on the matter, in turn leading to proposed amendments in the Lords.<sup>86</sup> In the event the House of Commons adopted its own amendments: the requirement of a positive opt-in remains, though now restricted to members who join after the end of a transition period or to unions which establish a political fund after that period - a compromise reflecting again, we suspect, the delicate political circumstances at the time of the EU 'Brexit' referendum.<sup>87</sup> The duty is supplemented by a requirement to give existing members an annual reminder of their right to opt out,<sup>88</sup> and a duty in new s.32ZB TULRCA to include details of the political expenditure in a union's annual return.<sup>89</sup>

*(viii) Facility Time and Check Off*

Clause 14 of the Bill as introduced in Committee envisaged a complete ban on the payment of union subscriptions by means of check-off. Once more there has been some compromise by the Government on this measure, and now s.15 of the TUA permits check-off to continue so long as the workers can pay subscriptions by other means and the union makes reasonable payments to the employer for the cost of performing this function. In the meantime in *Cavanagh v Secretary of State for Work and Pensions*<sup>90</sup> the High Court has held that a union could bring an action for breach

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<sup>86</sup> For an account of the background, see D Pyper n.37 at 6-7, and see the Select Committee on Trade Union Political Funds and Political Party Funding, *Report of Session 2015-16* (Stationery Office, March 2016) at <http://www.publications.parliament.uk/pa/ld201516/ldselect/ldtupf/106/106.pdf> (accessed 21 June 2016).

<sup>87</sup> See TUA s.11(5) and (6). There was speculation that a political compromise was temporarily reached whereby the Trades Union Congress (TUC) would promote the case that the UK remain in the EU, see <http://www.theguardian.com/commentisfree/2016/apr/28/david-cameron-unions-brexit-trade-union-bill-brendan-barber> (accessed 26 June 2016).

<sup>88</sup> See TUA s.11(2), introducing a new s.84A.

<sup>89</sup> See TUA s.12.

<sup>90</sup> [2016] EWHC 1136.

of contract for the unilateral removal of check-off, signalling future litigation over the issue, including on the issue of deprivation of property rights under Article 1, Protocol 1 ECHR.

The provisions on facility time await future regulations, not yet published even in draft form, but reflect the same policy of reducing the influence of public sector unions. Section 13 of the TUA introduces a new s.172A of TULRCA, by which regulations may require some or all public sector employers to publish information about ‘facility time’ - that is, time off for union duties and activities – such as the total amount or percentage of wages spent on it. In addition, a new s.172B of TULRCA gives a Minister of the Crown ‘reserve powers’ to make regulations limiting the amount of time each union official spends on union business or the percentage of the total pay bill spent on paying for facility time.<sup>91</sup> In this way, ministerial discretion has the potential detrimentally to affect the competence and capacities of union officials and with it public sector collective arrangements.

## 2. MOTIVATIONS AND JUSTIFICATIONS FOR REFORM

It is difficult to find a single unifying motivation or rationale for the assortment of measures originally proposed in the Bill and which have since been adopted in the Act. Yet, even at this early stage, when the ink is not dry on the statute’s velum, the articles in this journal offer useful contributions of what the TUA reveals about the ideologies and interests actually shaping the Conservative’s policies on labour relations. They indicate that the reasons were not due to any crisis in UK industrial relations, or a concern with human rights or democratic requirements. Rather, what emerges is a determination to place unprecedented controls on trade union activity for more pragmatic economic reasons, in ways that also smack of the re-emergence of a highly authoritarian state, increasingly undermining trade union internal affairs.

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<sup>91</sup> See TUA s.13. The power may only be exercised in the three years after the section comes into force: see s.172B(1), as introduced.

### A. The Reasons that Are Absent

There was no great crisis in industrial relations that precipitated this legislative measure, nothing like the ‘Winter of Discontent’ which spurred the adoption of the Employment Act 1980.<sup>92</sup> Nor is there evidence of any substantial pressure from business for further laws on strikes: official statistics published by ONS one day after the Bill was introduced showed that working days lost to strikes were at historically very low levels (even if those for 2014 were higher than 2013).<sup>93</sup> Indeed, responses to the first consultation papers after the Bill was issued demonstrated concern that the relatively harmonious climate of industrial relations currently prevailing could be jeopardised by the measures proposed.<sup>94</sup> While the Government tried to rely on evidence submitted to the Carr Review to indicate a pattern of union bullying of workers, Bruce Carr QC had not thought that evidence a sufficient basis to make concrete recommendations.<sup>95</sup> Further, as Dukes and Kountouris note: ‘In debates in the House of Commons, Ministers often referred to specific examples of behaviour which they sought to present as typical or common, without providing evidence that those examples were in fact representative.’<sup>96</sup>

Nor, following from Ewing and Hendy’s analysis, does the Government seem

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<sup>92</sup> Cf. Auerbach n. 1 above at 24-31 and 44-45.

<sup>93</sup> See Office for National Statistics ‘Labour Disputes: Annual Article 2014’ (16 July 2015), available at <http://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/workplacedisputesandworkingconditions/articles/labourdisputes/2015-07-16> (accessed 26 June 2016). These record that 788,000 working days were lost to industrial action in 2014, higher than 2013 (444,000) and 2012 (249,000) but lower than 2011 (1,390,000): see table 2 at 6. These numbers are dwarfed by figures in the 1980s and earlier: see figure 3 at 5.

<sup>94</sup> Joint Statement of Liberty, the British Institute of Human Rights, and Amnesty International, available at: <https://www.liberty-human-rights.org.uk/news/press-releases-and-statements/trade-union-bill-represents-major-attack-civil-liberties-uk> (accessed 26 June 2016); and see even the CIPD in <http://www.cipd.co.uk/pm/peoplemanagement/b/weblog/archive/2015/09/09/trade-union-reforms-are-outdated-response-warns-cipd.aspx> (accessed 26 June 2016) discussed in Ford and Novitz n.2 at 527.

<sup>95</sup> See Carr Review n. 21 at 1.

<sup>96</sup> Dukes and Kountouris n.52 at x.

significantly motivated or deflected by human rights concerns.<sup>97</sup> Indeed, this would be highly unlikely in the context of the contemplated repeal of the Human Rights Act 1998 and a plan to modify ECHR commitments such that the UK is not bound by judgments of the ECtHR.<sup>98</sup> Largely absent, too, from the Government's consultation papers was the idea of 'democracy', given such prominence in the 1980s legislative reforms regarding industrial action. The 'Background Notes' to the Queen's Speech of 2015 mentioned 'democratic' objectives, stating that aims of the new trade union legislation would be: 'Ensuring that strikes are the result of clear, positive and recent decisions by union members' and '[e]nsuring that disruption to essential public services has a democratic mandate'.<sup>99</sup> And there was one mention of the term in the consultation on *Ballot Thresholds in Important Public Services*.<sup>100</sup> While increasing turnout thresholds and expanding on information in the ballot paper on the basis of which workers can exercise their vote might be justified in terms of democracy, such reasons figured little in the Government's justifications and cannot explain most of the TUA. Minimum turnouts and 'super-majority' voting is not yet contemplated in other parts of British political life and were not even thought fit to apply to the much more significant referendum to exit the EU. This makes the requirement of 'clear and substantial' support that emerges in that consultation paper<sup>101</sup> more likely to have another motivation, as we explain below.

## B. Economic and Authoritarian Reasons

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<sup>97</sup> Ewing and Hendy n.32.

<sup>98</sup> See <http://www.theguardian.com/law/2015/may/27/threat-exit-human-rights-act-convention-dropped-tories-america> (accessed 26 June 2016); <http://www.independent.co.uk/news/uk/politics/david-cameron-refuses-to-rule-out-quitting-the-european-convention-on-human-rights-10294385.html> (accessed 26 June 2016).

<sup>99</sup> Queen's Speech 2015: Backgrounding Briefing Notes (27 May 2015) at 38 available at: <https://www.gov.uk/government/publications/queens-speech-2015-background-briefing-notes> (accessed 26 June 2016).

<sup>100</sup> See n. 14 above at [3]. Discussed in T. Novitz, 'UK regulation of strike ballots and notices – Moving beyond 'democracy'? (2016) *Australian Journal of Labour Law*, forthcoming.

<sup>101</sup> See also n.14 at [1] – [3] and [7].

While trade unions might have to spell out the reasons for calling industrial action on a ballot paper, the Conservative Government clearly did not feel bound by a comparable obligation to explain the reasons for enactment of the TUA. The content of *Modernising Industrial Relations* and the economic reasoning on which it was based were not placed before Parliament by the Government and its Ministers, who were only too well aware of its content. It was mostly hidden from the public gaze, for reasons which were and are unclear.

This is all the more worrying because *Modernising Industrial Relations* envisaged unions solely as a mechanism to curb the ‘monopsony power’ of certain dominant employers and thereby assist in achieving a legitimate wage premium where wages have been driven ‘below the efficient market equilibrium level’.<sup>102</sup> As Ewing and Hendy suspect, any notion of freedom of association or collective bargaining as human rights is left entirely out of the equation. According to *Modernising Industrial Relations*, the legitimate function of unions is confined to reducing the transaction costs which would follow from individually negotiated wages.<sup>103</sup> On this doubtful logic, the additional reforms advocated in the policy document could still be introduced, such as reduction of protections from unfair dismissal for participants in industrial action<sup>104</sup> and judicial review of action which causes ‘significant economic damage’.<sup>105</sup> Further, the paper advocates breaking up large unions and making them compete as ‘service providers’.<sup>106</sup> We do not know whether the Government picked most but not all of the paper’s proposals or by the same token whether some will resurface in the future.

Additionally, an even more basic instrumental economic set of objectives may be at issue. It is no secret that the current Conservative Government was elected in

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<sup>102</sup> *Modernising Industrial Relations* n.7, 25. See for further discussion, Novitz n.100.

<sup>103</sup> *Ibid*, 26.

<sup>104</sup> *Ibid*, 38. See for a richer alternative analysis, S. Deakin ‘The Law and Economics of Employment Protection Legislation’ in C.L. Estlund and M.L. Wachter (eds), *Research Handbook on the Economics of Labor and Employment Law* (Cheltenham: Edward Elgar, 2012).

<sup>105</sup> *Modernising Industrial Relations* n.7, at 39.

<sup>106</sup> *Ibid*, at 27-28.

the wake of a budgetary deficit created by prior attempts to mitigate the effects of the global financial crisis. On election to government in May 2015, the Chancellor, George Osborne, announced £12 billion of spending cuts.<sup>107</sup> The Queen's Speech indicated the Conservative Government's determination to 'continue with its long-term plan to provide economic stability and security... bringing the public finances under control and reducing the deficit.... Measures will be introduced to raise the productive potential of the economy ...'<sup>108</sup> The fifth of these was 'legislation to reform trade unions and to protect essential public services against strikes'.<sup>109</sup> Public sector unions were not going to be permitted to oppose such measures and so the TUA took measures to provide additional regulation of strikes in the IPS, as well as controls on facility time aimed at public sector unions. The initial plan to simply ban 'check off' in the public sector was clearly part of the same set of measures, although it was subsequently diluted as discussed above. It forms part of the over-arching objective which Bogg highlights, namely 'a disproportionate silencing effect on political challenges to an austerity agenda'<sup>110</sup> and a move to a more authoritarian mode of Government.

### 3. STRATEGIES AND EFFECTS

Any analysis of the likely effects of the TUA is bound to be contentious and incomplete. The limited empirical evidence based on the past shows that it may well have a dramatic effect on union's ability to conduct lawful industrial action, at least so long as these are dependent on traditional postal ballots.<sup>111</sup> But unions are already

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<sup>107</sup> See discussion at <http://uk.reuters.com/article/2015/06/20/uk-britain-economy-cuts-idUKKBN0P00VH20150620> (accessed 26 June 2016).

<sup>108</sup> Available at: <https://www.gov.uk/government/speeches/queens-speech-2015> (accessed 26 June 2016).

<sup>109</sup> Ibid.

<sup>110</sup> Bogg n.8 at x.

<sup>111</sup> See R. Darlington and J. Dobson, *The Conservative Government's Proposed Strike Ballot Thresholds: The Challenge to Trade Unions* (Liverpool: Institute of Employment Rights, 2015), discussed by Dukes and

considering how to adjust their strategies in light of the Act, and it will equally affect the conduct of workers and others who are less susceptible to ‘top down’ steering by legislative command. What of those strategies? We suggest that these may be summarised broadly in terms of litigation (primarily oriented towards a human rights challenge), lobbying (particularly in relation to the awaited secondary legislation and codes), legalism (exploiting any legal opportunities presented by the TUA) and leverage or other forms of protest action, whether undertaken deliberately to avoid the legal framework governing industrial action or occurring for other reasons. None of these affects the fundamentals of the TUA, although some have more promise than others.

One strategy for organised labour is to seek to improve the law in the field now overshadowed by TUA. The scope for significant changes to the legislation based on human rights’ challenges is very limited, however, as Ewing and Hendy persuasively argue in their article. The Government has already made clear its view of the wide margin of appreciation *RMT v UK* allows it. Nor is litigation based on Article 11 ECHR likely to force any change: the review of electronic balloting has cut off the most obvious proportionality argument at its root (albeit with no promise that it will in fact be introduced).<sup>112</sup> Indeed, Ewing and Hendy identify an implicit Article 11(3), operating both domestically and in Strasbourg, giving a broad bush exception to freedom of association rights in the UK.<sup>113</sup> The European Committee of Social Rights applying the ESC may be more active in its scrutiny of UK legislation, but the UK is not party to the Collective Complaints system which would give greater visibility and effect to Charter violations. Lastly, the Government has paid scant regard to the decisions of the ILO expert bodies, illustrated by the irrelevance of the latest pronouncement from the ILO CEACR to its legislative programme.<sup>114</sup>

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Kountouris n.52 at x.

<sup>112</sup> See the discussion of the debates in the House of Lords above.

<sup>113</sup> Ewing and Hendy n.32 at x.

<sup>114</sup> See ns 53 and 78 above.

In principle, there remains some scope for unions to lobby around the edges - for example as to the next appointee as CO<sup>115</sup> and to influence the awaited secondary legislation (for example on IPS and agency workers) and the anticipated codes of practice.<sup>116</sup> In theory, human rights' arguments should hold greater sway here because these provisions, unlike TUA itself, are vulnerable to being struck down if incompatible with Article 11, as the Government acknowledges.<sup>117</sup> In practice, however, this strategy faces severe limitations. First, the most significant provisions are in the TUA itself, not in secondary instruments. Second, the limitation of human rights' arguments highlighted by Ewing and Hendy are equally applicable here. Third, the Parliamentary process leading to the TUA shows why a high degree of pessimism (and cynicism) is justified, illustrated by the lack of transparent debate about what seem to be the actual reasons for reform set out in the Policy Exchange paper, *Modernising Industrial Relations*,). Fourth and finally, the concessions made by the Government in the course of the passage of the Bill through Parliament were probably due to the peculiar political circumstances of the time, and the need for the Conservatives to obtain the widest support when the EU referendum was looming. Post-referendum, and with the Conservatives likely to have leant further to the Right, similar concessions are unlikely to be given.

A further strategy, then, is for unions to attempt to identify and utilise the loopholes within the new legal environment. Take the example of industrial action. Some of the concessions made in Parliament provide a degree of assistance - for example, the 'defence' that a union has a reasonable belief that a majority of the relevant constituency are not engaged in IPS. However, despite the Court of Appeal's judgment in *Serco* signalling a (small) change in the courts' approach to industrial action injunctions, the starting point remains that a breach of any one of

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<sup>115</sup> For the significance of which, see Cavalier and Arthur n.20.

<sup>116</sup> A new Code of Practice on Picketing is envisaged, and presumably the existing Code on Ballots will need to be up-dated too.

<sup>117</sup> See e.g. letter from Sajid Javid of 5 November 2016 to Joint Committee on Human Rights, n. 42.



the legal rules will almost invariably result in an employer obtaining an injunction, for the reasons convincingly explained by Ruth Dukes and Nicola Kountouris in this issue.<sup>118</sup> The TUA adds very significantly to the employer's already large range of potential targets for an injunction, and generates a whole new set of interpretative issues to be resolved in interim proceedings<sup>119</sup> which it would be naive to assume will be read in favour of unions. Moreover, the ballot thresholds in the TUA may often be impossible to cross in practice, perhaps especially in industries where workers often change address, such as the construction sector, or do not benefit from union recognition or check-off arrangements. Unions will then be on the horns of a familiar dilemma of not striking at all or risking strike action from which they will not be immune and where the individual strikers will be at risk of dismissal without remedy,<sup>120</sup> a continuing blot on the legal protection of strikers in the UK.

A variant of this more legalistic strategy is for unions to reconfigure the constituency in an attempt to evade the reach of the TUA. They could, for example, define the relevant ballot constituency specifically to take account of the TUA, or break with the current tendency for aggregate workplace ballots and instead hold separate ballots at each workplace. Both of these are legally permissible: the provisions in TULRCA on who must be balloted are parasitic on which workers the union believes will be induced to take part in the industrial action,<sup>121</sup> and unions are permitted to hold separate ballots for each workplace under s.228 TULRCA. Under this strategy, unions could focus ballots in those occupations where the impact on the employer will be greatest and take every practicable step to generate a high turnout and vote in favour there; alternatively, in the future strikes may be confined

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<sup>118</sup> Dukes and Kountouris n.52.

<sup>119</sup> The provisions in new s.226(2B) clearly illustrate the interpretative difficulties, by which the 40 per cent. threshold is not engaged if (i) the union 'reasonable believes' (ii) at a time which is unclear (see the curious definition of 'relevant time' in s.226(1) and cf. the 'time of the ballot' in s.227) (iii) that a majority of the eligible constituency are not in 'normally engaged' in (iv) IPS (with the categories themselves unclear); each of these concepts gives rise to problems of interpretation and application.

<sup>120</sup> See the definition of 'protected industrial action' in s.238A TULRCA.

<sup>121</sup> See s.227(1) considered by Eady J in *Balfour Beatty* n.26.

to those specific workplaces where the ballot thresholds are crossed. But, quite apart from the administrative problems of organising ballots in this way, unions are not organisations whose orientation to the outside environment is purely strategic. Strikes are not simply a strategy to e.g. improve pay but are also, and perhaps above all, the expression of solidarity - a form of collective agency which is in tension with concentrating strikes in specific areas.<sup>122</sup> The element of solidarity is already diminished by the prohibition on secondary action; any attempt to engage in strategic, 'guerilla' action will transform strikes into something very different from what we know, with all kinds of unpredictable effects.

A fourth strategy is a growth in the use of 'leverage' action and other forms of protest not involving an inducement of breach of contract or the traditional industrial torts. Although the European Committee of Social Rights considers that additional protections should be given to pickets as their actions are a manifestation of the Article 6(4) ESC right to collective action and not merely of the rights to freedom of assembly and expression,<sup>123</sup> this cumulative approach has not yet fed into domestic law. Its Janus-faced attitude of domestic law is shown by the recent ruling in *Thames Cleaning and Support Services v United Voices of the World*,<sup>124</sup> in which Warby J had to consider the position of *both* workers who were engaged in a traditional picket governed by s.220 TULRCA and third parties engaged in protest action, which could not fall within the s.220 picketing immunity but which engaged Articles 10 and 11 EHRC, to which the enhanced *Cyanamid* test of *Cream Holdings v Barnerjee*<sup>125</sup> applies. The two were formally subject to different legal rules though occurring together. The TUA however to increase the incentives for unions to squeeze themselves into the second category, to relinquish picketing at the

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<sup>122</sup> C. Offe, *Disorganized Capitalism* (London: Blackwell: Polity Press, 1985), ch 7.

<sup>123</sup> See *European Trade Union Confederation v Belgium* (2012) 54 EHRR SE21 at [29] (on Article 6(4) of the revised 1996 ESC but which uses the same language as Article 6(4) of the ESC 1961, to which the UK is a signatory).

<sup>124</sup> [2016] EWHC 1310 (QB).

<sup>125</sup> [2005] 1 AC 253 (considered in *Thames Cleaning* at paras 29-32).

workplace and pursue protest action instead. This is an unintended consequence which may lead a future Conservative Government revisiting its dropped proposals to take further steps to regulate protest action, though its scope for action here is restricted by the Article 10 and 11 ECHR at least so long as that instrument is not supplanted by a British 'Bill of Rights'.<sup>126</sup>

But we must not forget that the TUA is not simply steering unions but will also affect workers in more diffuse ways which are less predictable. All the evidence shows that grievances and disputes at work remain as high as ever. The rosy picture painted by the Policy Exchange Paper, *Modernising Industrial Relations*, to the effect that strikes are no longer necessary because there are now 'superior mechanisms' such as 'appeals to industrial [sic] tribunals'<sup>127</sup> is contradicted by the empirical evidence that many workers are excluded from rights in the first place,<sup>128</sup> that tribunal fees have had a dramatic impact on legitimate claims,<sup>129</sup> and that the remedies given by the tribunals are usually small and are, mostly, unpaid by employers.<sup>130</sup> In the absence of effective legal rights, readily available employment elsewhere, or a practicable legal regime for taking lawful strikes, the scenario of protest no longer channelled through TULRCA becomes more and more predictable. The risk, however, is the emergence of a positive feedback mechanism. For if, as Len McLuskey warns workers will rebel,<sup>131</sup> the response may well be a growth of the authoritarian measures highlighted by Alan Bogg as already underpinning the

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<sup>126</sup> See on this S. Greer and R. Slowe 'The Conservatives' Proposal for a British Bill of Rights: Mired in Muddle, Misconception and Misrepresentation?' (2015) *European Human Rights Law Review* 372

<sup>127</sup> See *Modernising Industrial Relations* n.7 at 18.

<sup>128</sup> For example, those who are not 'employees' or 'workers' or who lack sufficient continuity to claim unfair dismissal.

<sup>129</sup> See e.g. HoC Justice Committee, *Courts and Tribunal Fees: Second Report of Session 2016-17* at 23-30 (available at <http://www.publications.parliament.uk/pa/cm201617/cmselect/cmjust/167/167.pdf> (last accessed 26 June 2016).

<sup>130</sup> See BIS, *Payment of Tribunal Awards: 2013 Study* (available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/253558/bis-13-1270-enforcement-of-tribunal-awards.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253558/bis-13-1270-enforcement-of-tribunal-awards.pdf) (last accessed 26 June 2016)

<sup>131</sup> L. McLuskey, 'Can Unions Stay Within the Law Any Longer?' (2015) 44(3) *ILJ* 439.

TUA.<sup>132</sup> As the papers in this volume indicate, implementation of the TUA indicates difficult and unpredictable times ahead.

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<sup>132</sup> Bogg n.8 at x.